

Estate Planning for Subsequent Marriages

By,

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With the increase in divorce rates and the increase in the number of subsequent marriages and blended families, the estate planning for such families naturally becomes more complex. Determining what is his, what is hers, what is ours, what goes to his children, what goes to her children, etc. are all common issues in subsequent marriage situations. For this reason greater care needs to be taken when setting up estate plans for people in their second or later marriage.

Because the husband and wife may not have the same desires in the estate planning area in subsequent marriage situations it is often times necessary to have separate estate planning attorney.

Often in subsequent marriages prenuptial or even post marital agreements are used. The estate planning professional needs to be vigilant in ensuring that any estate plan that is formed complies with the requirements of any pre or post marital agreements. Failure to do so can lead to litigation and other unpleasant encounters for both the client and the professional. In the case of second marriages one of the first things that the professional should ask is whether there are any such agreements or understandings between the husband and wife and their respective families. Even if there are not formal agreements between the husband and wife, they may still have certain understandings or desires with respect to their estate planning objectives.

One common desire in an estate for someone in a second marriage is the desire to provide for the spouse however to also ensure that his or her assets end up with his or her children as opposed to children of the other spouse. For this reason gifts to a second spouse on death are more often in the form of a QTIP trust rather than an outright gift to a spouse. Doing this ensures that the deceased partner's wishes are maintained and that the surviving spouse's children are not able to unduly influence the surviving spouse.

Even more complicated are blended families where the children are his, hers and ours. Often the husband and wife have a difficult time determining the best estate plan for their families. The estate planning professional needs to be vigilant in making sure that the husband and wife understand the affects and potential affects of their estate planning choices.

It is also important that the estate planning professional ensure that the husband and wife understand what provisions the law requires with respect to their estate planning. For instance many people are unclear what statutory rights or legal rights a surviving spouse has or that children of the decedent have with respect to the decedent's

estate. Any estate plan that is prepared needs to clearly state how that plan works whether it is in conjunction with or in lieu of statutory provisions.

Care also needs to be maintained when titling or holding assets in joint tenancy situations. Assets held in joint tenancy are transferred by operation of law rather than by will or trust. In other words if a husband and wife own a home in joint tenancy and the husband dies, automatically by operation of law, that house becomes the sole property of the surviving wife. Joint tenancy is often referred to as poor mans estate planning because it enables assets to transfer between two parties without the need of a will or trust. While joint tenancy ownership is common in first marriages, it is less common in second marriages and needs to be closely scrutinized before it is used in second marriages. This is because when the property transfers to the surviving spouse under joint tenancy it is transferred with no strings attached, meaning that the property may be disposed of as the surviving spouse sees fit. This may mean that the surviving spouse is influenced by his or her children and as a result sells the property, gives the proceeds to her own children while excluding the deceased spouse's children. Of course, this may not be in line with the overall estate planning objectives of the family. For this reason, it is often more common to see revocable trusts, especially joint revocable trusts, used in second marriage situations to ensure that the assets are distributed the way that both spouses desire. It is also much more common to see assets held separately rather than jointly, especially when a second marriage occurs later in life and both husband and wife enter into the marriage with their own separate and separately owned property.